IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

:::

JUDGMENT

Motumal and others
vs.
Choutharam.

S.B.CIVIL SECOND APPEAL NO.26/1985 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 12.9.1984 PASSED BY SHRI JAGPAL SINGH, ADDITIONAL DISTRICT JUDGE NO.2, JODHPUR IN APPEAL DECREE NO.8/1983.

DATE OF JUDGMENT ::: 1.2.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. CS Kotwani for Mr. MC Bhoot, for the appellants.
Mr. HR Soni, for the respondent.

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REPORTABLE

BY THE COURT:

Heard learned counsel for the parties.

The appellant is aggrieved against the judgment and decree passed by the appellate court dated 12.9.1984 by which the appellate court reversed the judgment and decree

passed by the trial court dated 20.5.1983 in Civil Original Suit No.288/1980.

It will be worthwhile to mention the facts of earlier filed civil original suit no.743/1973 which was filed by plaintiff Gyanchand and Motumal against the present defendant/respondent and two alleged sub-lettees. In the said suit, the plaintiff's plea was that the suit shop has been let out to the defendant Choutha Ram which has been sub-let to the defendants no.2 and 3 – Rajendra Parihar and Kana Ram Parihar and he handed over possession to those sub-lettees. The sub-lettees are running the tailoring shop in the disputed premises. The plaintiff sought eviction of the defendant no.1 Choutha Ram, who is respondent in the present appeal and was defendant in the suit before the trial court. The defendant no.1 submitted a detailed written statement in the said suit and pleaded that originally the suit premises was taken on rent either by Kana Ram or Kana Ram's wife Smt. Mooli Bai. Kana Ram started living with his family in the suit premises. After some time, Kana Ram got government quarter, therefore, he shifted his residence to the government quarter and the business of tailoring was started in the suit premises. The defendant submitted that Kana Ram's wife Smt. Mooli Bai is sister-in-law and she got tenancy transferred in the name of the defendant Choutha Ram. Thereafter, Kana Ram used to pay the rent as agent of the defendant Choutha Ram. The defendant also submitted in the earlier suit that though the tenancy was earlier in the name of the defendant

Choutha Ram but in fact, the shop remained in the partnership of the defendant and his sister-in-law Mooli Bai. To meet with the plea that the defendant sublet the shop and parted with the possession, the defendant submitted that when he was sick and went to his village, his son was looking after the business. It is also submitted by the defendant that he also was doing the business with the help of children of his relations but keeping the possession with him. The plaintiff's earlier suit was dismissed by the trial court vide judgment and decree dated 14.7.1978 against which the plaintiffs Gyanchand and Motumal preferred appeal which too was dismissed by the Court of Additional District Judge No.2, Jodhpur on 20.4.1979. It appears that no further appeal was preferred by the plaintiffs. The first appellate court in the judgment dated 20.4.1979 held that Kana Ram was not doing the business in the suit premises but in fact, he is only relative of the defendant Choutha Ram and there is every possibility that wife of Kana Ram, who is sister-in-law of defendant Choutha Ram and defendant's son were running the business of tailoring shop and Choutha Ram is also joined with them. The net conclusion is that the earlier suit of the plaintiff was dismissed on the grounds mentioned above by the trial court and the first appellate court.

After dismissal of the suit and the appeal by the first appellate court, the plaintiffs filed the present suit for eviction of the same tenant on the ground that after the

decision of the first appellate court in the earlier filed suit, the defendant removed his possession from the suit premises and started living permanently in his village. For this, above is the only pleading in the plaint. The defendant submitted detailed written statement and after narrating the facts which were given in the written statement filed in the earlier litigation, reiterated that the position which was continuing before filing of the earlier suit is continuing, the defendant again took the same plea that the suit property was taken on rent by Smt. Mooli Bai, wife of Kana Ram and after shifting of Kana Ram, due to allotment of government quarter, the premises is used for running the tailoring shop and Smt. Mooli Bai got the tenancy transferred in the name of the defendant and despite the fact of transfer of tenancy in the name of the tenant, the shop remained in the partnership (Sarakti) of defendant and Mooli Bai.

The defendant emphatically stated that because of going to his village, he has lost possession of the shop. He asserted that his servants are working in the shop who are appointed by the defendant himself and, therefore, there is no question of parting with possession by the defendant of the shop in question. The issues were framed and both the parties led evidence. The plaintiff only, appeared to prove his case whereas the defendant himself appeared in the witness box and produced witnesses DW2 Munna Lal and DW3 Kana Ram.

The trial court after relying upon the admission of the defendant in his statement where he admitted that he

shifted to Samdari from Jodhpur, held that the possession of the suit shop has been delivered to Mooli Bai and Mooli Bai cannot be treated as partner of defendant, therefore, the defendant is guilty of parting with possession of the suit property. The trial court rejected the plea of res judicata that since Mooli Bai was held to be tenant in the suit premises, therefore, the same issue cannot be re-agitated. The trial court decreed the suit of the plaintiff by judgment and decree dated 20.5.1983. Being aggrieved against the judgment and decree of the trial court, the defendant preferred first appeal which was allowed by the first appellate court by the impugned judgment and decree dated 12.9.1984.

It is submitted by the learned counsel for appellant that the first appellate court committed serious error of law in holding that the suit of the plaintiff is barred by principle of res judicata in the light of decision given by the civil court in civil suit no.743/1973. It is also submitted that the defendant in his statement before the court below in the present suit admitted that he left Jodhpur and shifted to Samdari and is in service of Railway department. In view of the above, the issue of parting with possession stand fully proved from the admission of the defendant apart from the fact that the plaintiff also stated on oath that the defendant has parted with possession of the suit premises.

Following substantial questions of law were framed by

this Court while admitting the appeal on 25.7.1985 :-

> "(1) Whether the present suit is barred on the principle of res judicata ?
>
> (2) Whether the tenant's shifting to Samdari amounts to his parting with the possession of the demised property ?"

Learned counsel for the appellant vehemently submitted that the plaintiff specifically pleaded that the defendant parted with possession of the suit property after the decision of first appeal preferred against the decree passed in the earlier suit no.743/1973, therefore, the very foundation of the plaintiff's claim and cause of action is the event which took place after the decision of the first appellate court, therefore, the suit cannot be held to be barred by principle of res judicata. Learned counsel for the appellant also vehemently submitted that the first appellate court heavily influenced by the findings recorded in the earlier litigation, reversed the findings of the trial court which is based on the admission of the defendant in present suit itself. It is also submitted that the defendant nowhere said that he is in possession of the suit shop or he is controlling the suit shop from Village Samdari which is far away from the city of Jodhpur. It is also submitted that the shifting of the defendant from Jodhpur to Samdari is subsequent to the decision of the appeal arose out of the suit no.743/1973 and, therefore,

also neither the principle of res judicata can be applied nor the issue can be said to be decided indirectly by the civil court in the earlier litigation between the parties.

Learned counsel for the respondent vehemently submitted that the plaintiff's suit should have been dismissed because of lack of pleadings about defendant's parting with possession or subletting the shop in dispute only as the plaintiff only pleaded in the plaint that the defendant removed his possession from the suit premises and started living in his village whereas the requirement of law for seeking eviction of the tenant under the provisions of Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (for short 'the Act of 1950') and particularly, under Section 13(1)(e), the plaintiff is required to plead that the tenant has parted with possession without the permission of landlord and in this case, there is no pleading that the defendant parted with possession without the permission of the landlord. It is also submitted that the plaintiff is purchaser of the property in dispute and the suit property was taken on rent by Smt. Mooli from the plaintiff's predecessor in title. The defendant's case throughout was that the suit property was taken on rent by Mooli Bai, sister-in-law of the defendant and she inducted the defendant as tenant with the consent of the landlord and the defendant's case also was that despite transfer of tenancy in favour of the defendant, the shop remained in the partnership (sarakti) with Mooli Bai. The Civil Court in earlier litigation between the parties unequivocally

declared that Mooli Bai was also in occupation of the shop with the defendant and that Kana Ram, Mooli Bai, defendant and his son all were doing the business of tailoring having their different job in the business. It is also submitted that the defendant's servants are doing the work on behalf of the defendant in the shop. In these circumstances, the physical presence of the defendant in the suit shop at all times was never there from very beginning nor it was necessary for the purpose of running the business of tailoring which was being done by Mooli Bai also being a member of family of the defendant and the defendant's son and servants are also occupying the rented premises. That was the position even from before the plaintiff filed the earlier suit. Those persons cannot be said to be having their independent possession and it is not the case of the defendant even that the person in occupation have ever claimed or are in possession independent to the defendant. It is also submitted that the suit itself is barred by principle of res judicata because on earlier occasion, the plaintiff filed suit for eviction of the defendant on the ground of subletting and that was dismissed by the trial court after taking note of all the pleas taken by the plaintiff.

I have considered the submissions of learned counsel for the appellant and perused the reasons given by the two courts below. I also perused the evidence produced by the parties and also the findings recorded by the appellate court in the appeal preferred against the judgment and

decree passed in civil original suit no.743/1973.

So far as the plea of appellant that the suit was held barred by principle of res judicata is concerned, that appears to have been taken by the appellant under wrong impression. The first appellate court has not held the suit to be barred on the principle of res judicata. The first appellate court held that the issue about actual physical possession of the suit shop and Mooli Bai is doing business in the suit shop jointly with the defendant was the point decided in the earlier litigation and that issue cannot be re-agitated in the present suit. It is different thing that it is one of the important finding which certainly affects the suit itself, therefore, in the opinion of this Court, the suit of the plaintiff was liable to be dismissed on this ground alone. Since the plaintiffs to avoid this consequence pleaded that the defendant committed mischief after the decision of the earlier litigation, therefore, the plaintiffs'suit as framed could not have been dismissed without enquiry about the fact that whether defendant shifted after the decision of the plaintiff's earlier suit. Total claim in the suit had foundation on an event which according to the plaintiffs is subsequent to the decision given in the earlier litigation and it is not the case of even the plaintiffs that any cause of action accrued prior to the decision given by the appellate court in the earlier litigation, therefore, the plaintiff could have proved the cause of action which according to him accrued to him after the decision of the first appellate court in earlier

litigation. As such, the suit was not dismissed as barred by principle of res judicata but was dismissed as the plaintiff failed in proving his plea of parting with possession of the suit property by the tenant after the decision of his earlier suit. Therefore, the plaintiff's suit was dismissed on fact as the Court found that parting the possession of the suit property by the defendant as alleged by the plaintiff cannot be accepted in the light of finding already recorded by the court in earlier suit between the parties.

So far as the issue which was decided between the parties about the nature of tenancy, the persons who were in occupation of the suit shop and were doing business is concerned, that was the plea taken by the defendant specifically in earlier litigation and the decision was given by the Court which attained finality, therefore, the defendant had full right to take the plea which he took in earlier litigation to show that how the business was going on and whether in the facts and circumstances, the physical presence of the defendant in the shop to run the business at all was necessary, he had right to submit that it was never objected by the defendant's earlier landlord. The obvious reason is that as per Section 13(1)(e), the eviction of the tenant can be ordered in a case where the tenant not only when he parts with the possession of the suit property but if that is done without the consent of the landlord. Here in this case, as stated above, there is no specific pleading of the plaintiffs that the defendant

parted with the possession of the suit property without the consent of the landlord. Apart from it, if all the facts which have not only been pleaded and for which the defendant lead evidence and those evidence have not been rebutted nor the pleadings have been controverted by the plaintiff, it appears that the suit shop was in tenancy of the defendant and Mooli Bai and all their family members like Mooli Bai's husband, defendant's son and all were helping in the business. It is not relevant that what was the character of those persons, whether they were joint in doing the business, whether Mooli Bai was co-tenant or not because of the simple reason that the defendant fully proved that the situation had not changed after the decision of the earlier suit. The continuity of the events which were going on since before the filing of the earlier litigation between the landlord and tenant could not have been valid ground in the present suit and could not have been objected by the plaintiff because if the plaintiff had any cause of action for eviction of the tenant on the ground that the tenant left Jodhpur, then it will be worthwhile to mention here that in this suit, the defendant very specifically pleaded that even earlier also, he left Jodhpur and shifted to his village and that plea was taken in the earlier suit but no eviction was sought by the plaintiff from the defendant on this ground.

It appears from the evidence of the plaintiff that he gave one line statement so far as merit of his case is concerned. He merely stated that the defendant removed his

possession from the suit shop. He has pleaded so without controverting or explaining the facts which were in his knowledge during earlier litigation as the defendant took the plea in earlier suit that business is being run in the suit shop by the defendant through Mooli Bai and his son.

In view of the above, it is clear that the first appellate court has not dismissed the entire suit of the plaintiff as barred by principle of res judicata but has held only some of pleas which were decided in the earlier litigation between the parties to the suit as barred by the principle of res-judicata, therefore, the substantial question no.1 is decided against the appellant.

In view of the facts mentioned above, it is clear that shifting of defendant to Samdari from Jodhpur in the peculiar facts of the case does not tantamount to parting with possession of the suit property by the tenant. Even the plaintiff did not plead that any of the person who is in occupation of the suit shop has ever claimed his independent possession to exclude the defendant.

It appears from the evidence of the plaintiff himself that more has been suppressed by the plaintiff in the plaint and in his statement rather than disclosing the complete facts for seeking relief. The defendant produced witnesses who admitted that they are in occupation of the suit shop as servant of the defendant or of Mooli Bai and they are not in occupation in their own independent right.

In view of the above, the substantial question no.2 is

also decided against the appellant.

In view of the above, I do not find any merit in the appeal, therefore, this appeal deserves to be dismissed, hence, dismissed.

(PRAKASH TATIA), J.

S.Phophaliya